UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

FOODLAND SUPER MARKET, LTD

Employer

and **Case 20-RC-155684**

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 480

Petitioner

DECISION AND DIRECTION OF ELECTION

By its Petition, and as amended during the hearing in this matter, the United Food and Commercial Workers Union, Local 480 (Petitioner) seeks to represent a unit of all bakery department managers and deli department managers employed by Foodland Super Market, LTD (Employer) at its facilities located throughout the state of Hawaii.

The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of the Act; the Petitioner claims to represent the Unit employees, and the Employer declines to recognize the claim; there is no collective-bargaining agreement covering any of the employees within the Unit or any other bar to this proceeding; and the Employer is engaged in commerce within the meaning of the Act.

The supervisory status of the bakery and deli department managers constitutes the sole issue in this matter. The Employer asserts that the bakery department managers and deli department managers are statutory supervisors within the meaning of Section 2(11) of the Act and that, accordingly, the petition should be dismissed.

Petitioner, on the other hand, asserts that neither position is supervisory as defined by the Act and that the petitioned-for unit is an appropriate unit.

For the reasons explained below, I conclude that the Employer has failed to meet its burden to demonstrate that the bakery department managers and deli department managers are supervisors within the meaning of Section 2(11) of the Act. Therefore, I find that the petitioned-for unit is an appropriate unit, and I shall direct an election among the unit employees, as set forth below.

FACTS

The Employer's Operations

The Employer operates 32 retail grocery stores in the State of Hawaii, all of which are involved in this proceeding. Hours of operation vary from store to store, with some facilities remaining open 24 hours. Each store operates a deli and a bakery department which are open for at least twelve hours a day, seven days a week. Each deli department and bakery department is staffed by one full-time department manager, one full-time assistant department manager, and between one and six part-time and full-time clerks.[1] The bakery and deli department clerks and assistant department managers are covered by a collective-bargaining agreement between the Employer and Petitioner. There is no record evidence of any bargaining history regarding this system-wide unit of deli and bakery department managers.

The bakery and deli department managers report to the store director and assistant store directors at each location for operational needs. They additionally report

[1] The record reflects that some bakery departments currently have vacant Assistant Manager positions.

to one of two deli/bakery supervisors with regard to sales and merchandising. The deli/bakery supervisors, in turn, report to the deli/bakery department director. The deli/bakery supervisors visit each store once a week or less, whereas the store director or assistant store directors are present at their assigned store every day. Deli and bakery department managers are scheduled for eight-hour shifts, five days per week. The testimony established that, while store directors and assistant store directors work for extended periods without a bakery or deli department manager, the latter never work without at least one of the former present.

At each location, the bakery and deli department managers schedule employees in their respective departments, order merchandise, erect displays, price merchandise, and maintain cleanliness. The deli department prepares hot entrees in addition to sandwiches, party platters, and other ready-to-eat items and the bakery department prepares and decorates pastries.

Authority to Hire or Fire

The record establishes that neither bakery nor deli department managers have the authority to hire, fire, transfer, suspend, layoff, recall, or promote employees. In this regard, Deli/Bakery Department Director Karlyn Laulusa testified that control over the Employer’s labor force rests exclusively with district managers and store directors. While there is some testimony that deli and bakery department managers were involved in the process of hiring or firing three employees in 2015, in all three instances described on the record, the department managers neither effectively recommended nor made the final decision regarding the hiring or firing of the subject employees.

In the first and second examples, Bakery Department Manager Araceli Acosta asserted that she hired employees on two different occasions within the last two years. In the first instance, Acosta testified that she independently conducted the initial interview of an applicant who had been recommended to her by a deli clerk. Acosta later accompanied the store director during the second interview of the employee. That applicant was ultimately hired, but there is no record evidence that management consulted with Acosta about the hiring decision, much less that Acosta independently hired or effectively recommended that s/he be hired.

In the second example, Acosta testified that she informed the store director of her belief that she needed a new employee. The store director then commended to her a retail clerk for interview. After speaking with the recommended retail clerk, Acosta told the store director that she wanted that person in the bakery department. The Employer ultimately approved the transfer of the retail clerk to the bakery department, but the record is devoid of evidence that Acosta made the decision or that Acosta's wishes formed the basis for the Employer's decision to transfer the clerk.

In the third and final example, Director of Human Resources Monrae Bailey testified about an e-mail that Deli Department Manager Nikita Villegas[2] sent to human resources about a deli clerk's failure to follow rules and complete required tasks. The email was offered as an exhibit to establish that Villegas effectively recommended that this deli clerk not pass his probationary period based on his performance. However, the email contained no such recommendation, and there is no other evidence on the record to show that the Employer based its decision to terminate the employee on Villegas'

[2] Nikita Villegas was not called to testify, however, her email is included as Employer Exhibit 11.

recommendation. Rather, Monrae Bailey testified that both the store director and her colleague in human resources independently reviewed the employee's personnel file and the photographs of his unfinished work before making the decision to terminate the employee.

There is no other record evidence purporting to establish that deli or bakery department managers exercised authority to hire or fire an employee.

Authority to Meaningfully Reward Employees

The Employer operates a performance-reward program for employees called "ShakaBucks," wherein employees can earn one ShackaBuck at a time to purchase retail items in the store (e.g., six ShackaBucks for a snack). Bakery and deli department managers distribute ShackaBucks to reward employees according to fixed rules established by the Employer.[3] The testimony regarding whether a department manager has discretion in granting this reward was contradictory. Some department managers were assertedly allowed to award "ShakaBucks" largely at their discretion, while others had no discretion. There was also some testimony that bargaining-unit assistant managers were equally able to distribute ShakaBucks to employees and that assistant managers, as well as clerks, were able to request or effectively recommend employees for the reward.

The record also cited a newly instituted bonus system called the "Kinoole Program," in which all department employees are rewarded with a bonus after meeting sales targets. The evidence clearly established that deli and bakery department

[3] Employer Exhibit 6.

managers have no discretion with regard to rewarding employees through the Kinoole program because all employees within the department are rewarded evenly once a sales goal is met. Department managers do not receive an additional bonus through the program, nor do they have authority to provide greater bonuses to particular employees.

On this record, there are no other means by which department managers may reward employees.

Authority to Responsibly Direct or Assign Work

There is ample testimony regarding the bakery and deli department managers' authority, or lack thereof, to responsibly direct the work of other employees. Department managers are responsible for drafting the weekly schedules for department employees and ordering the products that are prepared and sold by the department. However, it is undisputed that both of these job duties are performed in strict accordance with the Employer's House Rules[4] and are largely formulaic.

According to guidelines established by human resources, the work schedule must include a minimum 40-hour work week for the department's full-time employees and a minimum 24-hour work week for the department's part-time employees. Part-time employees are scheduled according to seniority. There was testimony that department managers routinely honor employee preferences when drafting the work schedule, and that the relatively small number of available employees dictates coverage and limits the

[4] The record makes repeated reference to the Employer's seemingly extensive work rules, called House Rules, but they are not in evidence.

latitude one might otherwise have in scheduling. With regard to assigning employees to particular shifts, the guidelines are less instructive. For example, a bakery department manager may schedule a clerk for the opening shift, rather than the closing shift, to ensure that the clerk remains familiarized with opening shift duties, such as donut preparation. However, Store Director J.R. Oshiro-Koanui testified that store directors retain the authority to modify or override weekly schedules prepared by department managers. There was no testimony addressing how often this is done or why a store director might choose to modify a schedule. Department managers do not have the authority to approve time-off requests of a duration longer than one day, but in some cases the Employer permits employees to use the department managers as conduits to report to the store directors absences of a shorter duration.

The record established that store directors approve all overtime. This occurs very infrequently; i.e. when a deli or bakery department must meet the demands of a holiday or a major celebration such as the Super Bowl, when there is an expected increase in sales. Testimony from several department managers indicated that, in those rare instances, they obtain approval for additional employee hours from the store director or the administrative office ahead of a known busy period. If overtime is required to complete a production task, such as finishing a party platter or decorating cupcakes, the department manager solicits pre-approval from the store director for overtime as little as 15 minutes.

Department managers are also responsible for ordering products necessary in their department. They are limited to purchasing pre-approved products from pre-approved vendors. The budget used by each bakery and deli department manager for ordering products is determined by calculating half of the department's previous week in sales. The budget is communicated to the bakery or deli department manager by the deli/bakery supervisor. The deli department budget ranges from $8,000 to $50,000 per week and the bakery department budget ranges from $4,000 to $30,000 per week depending on store volume. Department managers cannot bargain with vendors over prices, cannot order from non-approved vendors, or establish their own budget outside of the Employer's set guidelines. Store directors dictate which products the department managers will feature in the display cases and this, in turn, impacts what the department manager orders.

Department managers work alongside assistant managers in production. Deli Department Manager Reynie Garan, the lone employee who testified on the subject, asserted that entrees are all prepared the same way according to recipes which are shared among the deli departments. Deli department managers have some discretion in deciding which hot entrees will be prepared daily and who will prepare them. The Employer has established guidelines listing how many entrees must be prepared by the deli department each day and where the products can be obtained. In addition, there are company-wide theme days, such as local Hawaiian food on Tuesdays and Fish on Fridays, which dictate a portion of the menu and food preparation. The record is replete with testimony that all employees are expected to perform all department tasks, which includes the expectation that all deli department employees are able to prepare all entrees.

Department managers determine which employee will operate which piece of equipment or prepare a particular item. For example, in the deli, this includes the tasks of frying chicken and preparing sandwiches and entrees. In the bakery, department managers determine which employee will decorate the cupcakes or prepare brownies, etc. These tasks are often assigned according to the schedule so that they can be accomplished within a certain time frame according to the Employer's guidelines. By way of example, sandwich preparation is assigned to the deli employee who commences work at 5:00 a.m., and donut preparation is assigned to the first bakery employee of the day to ensure that products are available to customers by a certain time. There is also testimony that the department managers assign tasks according to demonstrated individual employee efficiency. Finally, all department managers use a notebook to communicate in writing the assignment of duties to department employees. The notebook contains assignments, such as "make veggie trays," "clean the fryer," or "sweep and mop the floor." While some of these tasks are written next to an employee's name, others are left simply for the next person on shift. The notebook is used as a way of communicating a departmental "to-do" list.

<u>The Authority to Discipline</u>

The record established that deli and bakery department managers report employee misconduct to the store director, but they do not possess the authority to independently discipline or effectively recommend the discipline of employees. Indeed, their recommendation, if any there be, has not been shown to be a determining factor when the Employer makes a final decision regarding whether to issue discipline and to what degree.

The Employer introduced 30 notices of discipline into the record to support its contention that department managers either directly issue or effectively recommend discipline. All but five of the 30 disciplinary documents in evidence are dated sometime between 1992 and 2011. Of the five most recent disciplinary documents provided by the Employer, two were issued and dated in 2013 and three were dated in 2015. The Employer entered 27 of the notices through witness Karlyn Laulusa as an asserted representative sample, but she was unable to explain the Employer's methodology in selecting the sample.[5] Notably, in 2011, the Employer changed its procedure for issuing discipline in a way that greatly reduced the department manager's involvement in the disciplinary process. The Employer switched from hard-copy disciplinary forms, which the department managers previously signed, to electronic forms that only store directors and Human Resources can access.

The record shows that the Employer issues discipline to employees in accordance with a progressive-discipline system. The initial step is an oral coaching which may be given to employees by the department manager, but oral coachings are not documented in the employee's personnel file. After oral coaching, the next step is a written warning, and discipline thereafter may include suspension up to, and including, termination. When a bakery or deli department manager observes employee misconduct, the department manager is required to report the observation to a store director, who then records the incident in the Employer's online system. The report is then routed to human resources where it is reviewed and a final decision is made regarding what level of discipline, if any, to issue to the offending employee. The

[5] Whatever the methodology, I only have before me the "sample" evidence adduced at the hearing.

department managers do not have direct access to the Employer's online discipline system. The department manager also does not present the written warning to the employee for signature and does not meet with the employee to discuss the discipline.

Additionally, department managers receive little or no training on this subject. The deli department manager's four-page job description does not include issuing discipline or making recommendations regarding discipline as one of the job duties or expectations of the position. One deli department manager testified that the Employer trained him merely to notify the store director if a problem arises with an employee and to take no further action. The same deli department manager testified that, if he possesses authority to independently discipline employees or to recommend discipline, he has never exercised it and is unaware of it.

The record contains contradictory testimony on whether human resources personnel consider recommendations from department managers when making disciplinary decisions. There was conflicting testimony about whether human resources personnel followed the department manager's disciplinary recommendations, but the documentary evidence establishes that department managers do not submit formal disciplinary recommendations. Rather, as discussed below, it appears from the record evidence that human resources make the decisions independent of any recommendation by a department manager.

There are four notices of discipline contained in the record that were generated under the Employer's current online discipline system which, as mentioned above, has been in place since 2011.[6] Notably, the disciplinary documents entered into the record contain a section for the department managers (via the store directors) to provide a narrative of the incident. However, the document does not include a field for, nor do the proffered examples reflect, the department manager's disciplinary recommendation. Furthermore, the notice contains a signature line for the store director and the subject employee, but does not contain a space for the department manager to sign. The narrative portion of the write-up might refer to the department manager as the person who has summarized the incident in question, but does not always mention the department manager. Additionally, the disciplinary documents do not clearly show whether the referenced department managers initiated the write-ups and/or had a role in determining whether and what level of discipline to issue the employees.

The first disciplinary form submitted in evidence, dated in 2015, indicates that a store director is requesting that an assistant deli manager be warned for failure to perform work as required.[7] The deli department manager is mentioned in the narrative portion of the document as the individual who reported the poor performance to the store director. The document contains nothing to indicate that the deli department manager recommended discipline or that the report resulted in discipline. The status of the report, listed in the top right corner of the document, reads "not yet submitted" to human resources.

[6] The fifth notice of discipline, discussed briefly below, issued within the last four years but was generated under the Employer's old paper system.
[7] Employer's Exhibit 8

The second disciplinary form, also dated in 2015, was issued to a bakery clerk who failed to perform work as required.[8] The incident description states that the bakery manager alerted the store director to the problem, who in turn, confirmed that the clerk's performance needed improvement. The store director then routed the write-up to human resources, which then decided to issue the bakery clerk a warning. There is nothing in the record that indicates that the bakery manager recommended discipline or that, if s/he did, that the Employer adopted it.

The third disciplinary form from 2015 involved another bakery clerk who failed to report for a scheduled shift.[9] Again, the notice is signed only by the store director and the employee. The description of the incident also states that the bakery clerk notified the store manager, acting store director, and the in-store coordinator of her intention to miss her scheduled shift in order to attend a wedding. Accordingly, the document does not demonstrate that the bakery department manager made the decision to discipline the employee or effectively recommended that she be disciplined.

The fourth disciplinary form is dated March 12, 2013, and was also prepared through the Employer's current online system.[10] It describes an incident in which an assistant deli manager was disciplined for failing to follow sanitation rules. The narrative portion of the document explains that the deli department manager observed a violation of sanitation rules and notified the store director, who then further investigated the incident. The narrative also indicates that the store director, rather than the department manager, confronted the deli assistant manager about the infraction prior to

[8] Employer's Exhibit 9
[9] Employer's Exhibit 10
[10] Employer's Exhibit 12

inputting the information into the online system. The document shows that the incident occurred on March 11, 2013, that the store director submitted the notice to human resources the following day, and that human resources issued a decision on March 19, 2013. This documented disciplinary decision-making process is consistent with testimony from department managers, a department supervisor, store director and director of human resources.

The final disciplinary document in question is dated November 17, 2013, and seems to be a relic from the Employer's old paper system.[11] The document is titled, "Foodland Employee Warning Notice" and it is signed by a deli department manager. Testimony elicited on cross-examination, however, showed no indication that this form ultimately resulted in disciplinary action against the employee in question. Nor is it clear that the department manager who signed the form was involved at all in the disciplinary decision. There was also no explanation as to why the Employer's old paper form was used instead of its online system which had already been in place for two years.

Secondary Indicia of Supervisory Status

The minimal evidence that exists regarding secondary indicia of supervisory status applies equally to bakery and deli department managers. They are expected to attend weekly meetings to discuss sales goals and safety with other department managers. Other department heads in attendance include the meat, seafood, and

[11] Employer's Exhibit 12

produce department managers.[12] The weekly department meetings are led by the store director and the in-store coordinator. Clerks do not attend the weekly meetings. Bakery and deli department managers do not receive any additional information beyond what the bargaining unit department managers receive.

Department managers earn more than clerks and assistant managers. Bakery department managers earn $16.90 per hour, where assistant managers earn $15.40 and bakery clerks earn $14.40 per hour. Similarly, deli department managers earn $19.20 per hour compared with $17.40 for an assistant deli department manager. There is no evidence that department managers receive any additional benefits beyond a higher wage rate. There is no evidence as to whether they are indicated as supervisors on payroll. The record provides no information on the wages or benefits of store directors or the deli/bakery supervisors.

There is no indication of how other employees regard department managers. There is some testimony that the Employer has the same expectations of bakery and deli department managers as it does of other meat, seafood, and produce managers, who are covered by a collective-bargaining agreement. Bakery and deli department managers work side by side with clerks and assistant managers and estimate that they spend between 90% - 95% of their time doing the same production work, with the same instruments, as other department employees. Depending on the store, the ratio of department managers to other employees ranges from approximately 1:2 to 1:6. Department managers do not have an office, a desk, or a separate break room.

[12] The meat, seafood, and produce department managers are all covered by the same collective-bargaining agreement that the department clerks and assistant department managers are under. The meat and seafood department managers also operate service counters, write schedules and order products like the deli and bakery department managers.

ANALYSIS

The term "supervisor" is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the Employer, to hire transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment" and, their authority is held "in the interest of the employer." Supervisory status may be shown by demonstrating that the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. See *Oakwood Healthcare, Inc.,* 348 NLRB 686, 687 (2006).

As a general principle, the Board exercises caution “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Chevron Shipping Co.,* 317 NLRB 379, 381 (1995); *Oakwood, supra,* 348 NLRB at 688. In *Oakwood*, the Board further observed that the term supervisor was not intended to include “straw bosses, lead men, and set-up men,” who are protected by the Act even though they perform “minor supervisory duties.” *Id.* (citing *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 280-281 (1974)). Rather, the putative supervisor must exercise “genuine management prerogatives," identified as at least one of the twelve supervisory functions listed in Section 2(11) of the Act. If the putative supervisor has the authority to exercise or effectively recommend the exercise of at least one of these twelve functions, Section 2(11) status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion, but with independent judgment. *Id.*

Further, whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility and relationship to management. See *Phillips v. Kennedy,* 542 F.2d 52, 55 (8th Cir. 1976). The Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB,* 445 F.2d 237, 243 (D.C. Cir. 1971); *Chevron, USA,* 309 NLRB 59, 62 (1992). The burden to prove supervisory status is on the party asserting it. This burden must be satisfied by "a preponderance of the credible evidence." *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

I find that the Employer has failed to meet its burden to demonstrate that Bakery and Deli Department Managers are supervisors within the meaning of Section 2(11) of the Act. The record makes clear that all of the tasks performed by Department Managers are proscribed by the rules and guidelines set by the Employer, and that the vast majority of a department manager's time is spent doing the same tasks as clerks. The record also demonstrates that Department Managers have no authority to hire, fire, layoff, recall, transfer, suspend or promote employees and they have no authority to adjust grievances. Any ability Department Managers have to reward employees is limited to the distribution of "ShakaBucks," which have limited value, are distributed in accordance with strict guidelines, and are not distributed exclusively by Department Managers.

To the extent that department managers have a role in the discipline process, they act more as a conduit of information than anything else. When an alleged supervisor does "little more than report employee infractions to management," such action does not constitute discipline or effective recommendation. *Williamette Industries*, 336 NLRB 743, 743 (2001). Any authority the department managers might have previously possessed to issue an employee written discipline was supplanted by the online system sometime in 2011. For the past four years or more, the only role bakery and deli department managers play in the disciplinary process is reporting an observed infraction to the store director. Beyond that, it appears from witness testimony and the scant relevant documentary evidence submitted that department managers are altogether excluded from the process. By all accounts, any discipline that issues is determined by human resources after its own independent review. Merely reporting misconduct or poor performance to a store director does not amount to effectively recommending discipline. The Board has held that the ability to refer rule infractions to supervisors, or simply inspecting and reporting the work of others, does not elevate an employee to supervisory status. *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286 (2005); *Brown & Root*, 314 NLRB 19, 21 n. 6 (1994).

It bears noting that the Employer's progressive-discipline policy appears to be uniform and that disciplinary decisions are controlled by the Employer's established guidelines. It thus appears that there is little or no room for the exercise of independent judgment in meting out discipline, even by the human resources personnel who ultimately make the decisions. The Board has held that such a rote discipline process does not demonstrate the use of true independent judgment. See *The Wackenhut Corporation*, 345 NLRB 850, 854 (2005). The department managers clearly lack the authority and wherewithal to effectively recommend discipline, much less to discipline employees on their own.

Finally, the record evidence establishes that the use of oral coaching does not constitute discipline. According to the witness testimony, oral coachings are not considered formal discipline and are not used by the human resources department in making disciplinary decisions. The Board has made clear that such discussions do not constitute the imposition of discipline or the effective recommendation of discipline. *Los Angeles Water and Power Employees'Assn*, 340 NLRB 1232, 1234 (2003).

With regard to assigning work, bakery and deli department managers do not exercise independent judgement when assigning tasks to employees. The evidence establishes that the department managers' assignment of work is limited to creating a weekly schedule and leaving a "to-do" list for employees in a daily notebook. Certain tasks are to be performed at a given time of day, so that assigning someone to the opening shift necessarily alters some of the tasks that an employee would perform relative to the closing shift. Should a given task need to be completed by the following shift, the department manager will document it in the notebook. Such "occasional shifting of tasks performed by employees does not establish supervisory status." *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84 (2014), citing *Croft Metals, Inc*., 348 NLRB 717, 722 (2006). The work assignments of each department employee are largely determined by the objective criteria established by the Employer including production goals, hours of operation, and minimum hours for full and part-time employees. Department managers occasionally move an employee from opening to closing shifts to ensure each employee is rotated through the various tasks of the department in order to be fully trained. The Board has found no independent judgment where a team leader assigns work using a rotational system. See, *Modesto Radiology*, supra; *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1424 (2010). Thus, department managers do not assign work in a manner that requires the use of independent judgment.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1) The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2) The Employer is an employer as defined in Section 2(2) of the Act, and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3) United Food and Commercial Workers, Local 480 is a labor organization within the meaning of the Act.

4) A question affecting commerce exists within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5) I find that the following unit is an appropriate unit for collective bargaining purposes:

All full-time and regular part-time bakery department managers and deli department managers employed by the Employer, excluding all other employees, guards, managers, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the Unit found appropriate above. The Unit employees will vote whether or not they wish to be represented for purposes of collective bargaining by UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 480, or by no union.

A. Election Details

After careful consideration of the parties' positions and evidence, I have determined for the reasons that follow that conducting the election by mail, as described below, will best ensure the effective exercise of employees' Section 7 rights:

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Subregion 37, on **August 24, 2015.** Voters must return their mail ballots so that they will receive in the National Labor Relations Board, Subregion 37 office by close of business on September 8, 2015. The mail ballots will be counted at the Subregion 37 office located at 300 Ala Moana Boulevard, Room 7-245, Honolulu, HI 96850-4980 at 10:00 am on September 10, 2015.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Subregion 37 office by no later than 5:00pm on **August 31, 2015** in order to arrange for another mail ballot kit to be sent to that employee.

The parties were allowed to submit positions and evidence on the record regarding their preference for the method, date(s), time(s) and location(s) of the election that Subregion 37 will conduct among approximately 65 unit employees employed at the Employer's 32 facilities throughout the state of Hawaii. The Petitioner proposed a mail-ballot election on the grounds that employees are scattered geographically, while the Employer opposes balloting by mail. Instead, the Employer proposed that a manual election be held on multiple islands over multiple days. Record testimony established that the unit employees work out of 32 separate facilities across four islands and that no more than 11, and as few as 2, employees work at each store.

Conducting a manual election in these circumstances would require deploying several Board agents far afield by plane and automobile for dozens of hours of polling over multiple days. Suffice it to say that conducting the election manually in these circumstances would be impractical, and as a secondary consideration, would be an imprudent expense of Agency resources. See *California Pacific Medical Center*, 357 NLRB No.21 (2011); citing *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Accordingly, a mail-ballot election will better ensure that every eligible voter has a convenient opportunity to participate, should he or she so choose, and will also conserve precious Agency resources.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by 5:00 p.m. (HAST) on **August 14, 2015**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or reasonably larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties name in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. (HAST) on Wednesday, August 19, 2015.** If the Employer does not receive copies of the notice by **Thursday, August 13**, **2015** it should notify the Regional Office immediately.

Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters or potential voters to vote, please inform the undersigned as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at San Francisco, California, this 12th day of August 2015.

/s/ J. F. Frankl
Joseph F. Frankl, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735